The **Myth** of Data Rights

Peter A. Czech

The mystery surrounding data rights stems from the fact that intellectual property (IP) and data rights are among the more complex issues in acquisition management.

How does one reduce the complexity and make the subject more understandable? First, we must understand and answer the following: What are data rights? How can we remove some of the myths surrounding them? What can we do if we don't own the data rights?

Before we answer these questions, a review of history is in order. Back in the 1950s and 1960s, the U.S. Government was leading in research and development (R&D) spending. The government spent between 60 percent and 70 percent of the national R&D expenditures. Most of these expenditures focused on landing a man on the moon. President Kennedy stated that "this nation should commit itself to achieving the goal, before this decade is out, of landing a man on the moon and returning him safely to Earth." In those days, the U.S. Government held all of the IP cards. The government owned a majority of the IP on space exploration and was able to use it as was required. After the nation landed a man on the moon, the national R&D spending gradually was reduced.

As we fast forward to the year 2000 and through to the present, the R&D roles have reversed. Industry is leading in R&D expenditures. And industry's view of IP is diametrically opposed to that of government. (See Figure 1.)

Industry View

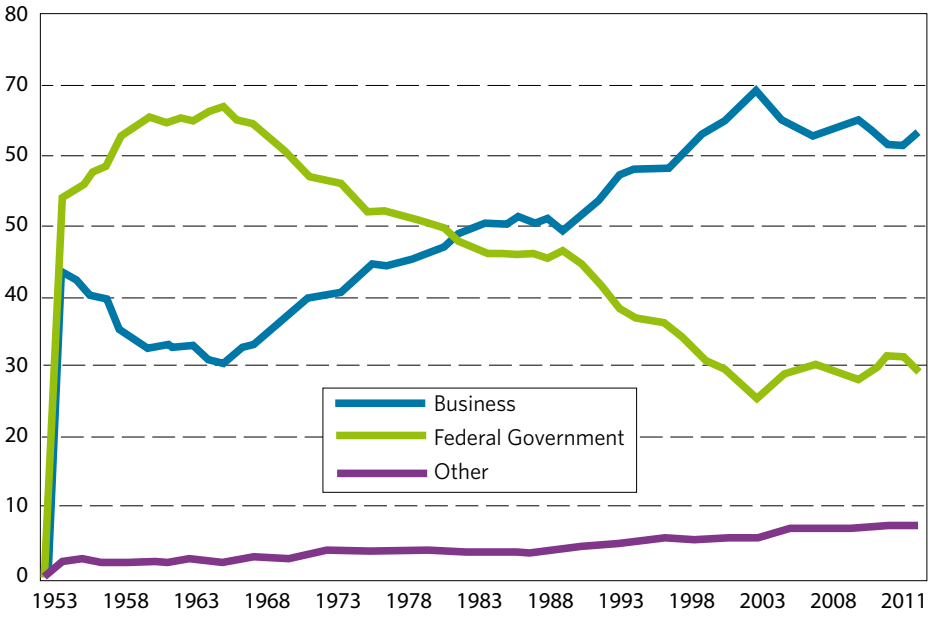
IP is the lifeblood of a contractors' business. For most businesses, IP *is* the business. Their IP allows them to design, build, test and field items that are unique from their competitors' and allows customers to assign high value to their goods and services. Since IP is the lifeblood of the contractors' business, they will protect it at all costs.

The business IP allows it to build wealth around the design, manufacture, test, sustainment and disposal of an item. Each of these phases of the product development cycle is a renewed income stream for the business. Any business would be loath to give up even one of these income streams for any reason. Additionally, having the IP blocks a competitor from entering the marketplace.

Czech *is a Professor of Program Management in the School of Program Management of the Defense Systems Management College at the Defense Acquisition University, Fort Belvoir, Virginia. He previously worked for Chrysler Corp.*


DATA RIGHTS • INTEL
LECTUAL PROPERTY
• DATA RIGHTS • INTE
LLECTUAL PROPERT
Y • DATA RIGHTS • IN
TELLECTUAL PROPER
TY • DATA RIGHTS • IN
TELLECTUAL PROPER
TY • DATA RIGHTS • IN

Figure 1. National R&D Expenditures, by Funding Sources



Note: "Other" includes universities and colleges, state and local governments, and other nonprofit organizations.

Source: National Science Foundation, National Center for Science and Engineering Statistics, National Patterns of R&D Resources *(annual series).*

One must remember, however, that all IP is not codified. This knowledge—or IP—manifests itself in tribal knowledge or on processes that a company fine-tunes over time. This information is not written down; it's just how we do things here. The company may not know why the process works—but it does work. Therefore, a third party (i.e., the U.S. Government) may have the IP from a company but not the "secret sauce" needed to recompete a project.

Government View

The government looks at IP from two different lenses. First, as a purchaser of goods, government wants competition—for this lowers prices for the goods and services it buys. Competition also drives better solutions into the marketplace, and this also brings lower costs.

The government wants to receive the best return on its investment. The government does not want to pay more than once for the same thing. It also doesn't want to be locked into a sole-source situation, which would enable the source company to charge higher prices than would be possible in a competitive situation. The government wants an assured service, repair and a modification source that will provide best value at an affordable cost.

The second lens the government looks through on IP begins with our nation's Founding Documents. Article I, Section 8 of the *United States Constitution*, provides that, "The Congress shall have power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Thus, the government wants private-sector industries to maintain their IP. This view can conflict with having competition. On one hand, we want the best value for the dollar, and on the other hand we want the best outcome or product for the public sector. Where does the myth of data rights originate?

Myths

The Merriam-Webster Dictionary defines myth as "an idea or story that is believed by many people but that is not true." The first myth that most folks have is that data rights and IP are interchangeable. They are not! "Intellectual Property is an expression of a new and useful concept that can be legally protected such that the originator is granted certain exclusive rights." However, data rights are a shorthand way of referring to the license rights that the Department of Defense (DoD) acquires to use and publish information. This concept is the hardest to fathom. If we paid for the IP, then we should get the IP. Not so fast: We may have thought (or implied) that we paid for the IP, under *Federal Acquisition Regulation (FAR)* 27.403, but what was stated in the contract? The *FAR* provides that:

> "Data rights clauses do not specify the type, quantity of data that is to be delivered, but only the respective rights of the government and the contractor regarding the use, disclosure or reproduction of the data. Accordingly, the contract shall specify the data to be delivered."

In other words you only possess the data that are explicitly required in the contract. Use caution on what you ask for and why you require the information. That "why" must be included in your IP strategy. Your IP strategy must include the reasons you require the information and when you need it. Remember, timing is important in your IP strategy.

A delay in needing the information may reduce the cost of that information. For example, if you need the information 15 years from now, this information will be less valuable to the contractor than it is today and thus less costly to you. Knowing that the information in the future will be less valuable to the contractor may allow you to use an option strategy to acquire the IP when you really need it. You could use an option strategy when you are acquiring data rights. Some questions to explore:

- Do I need the information to recompete the source? When will I recompete?
- Do I need the information for diminishing manufacturing sources of supply? When will those sources be available?

Listed below are the fundamental questions that must be answered by the program team regarding its IP strategy.

- What IP do I need for my program?
- What rights do I have?
- When do I need this data?
- How am I at risk?
- At what price?

These questions need to be answered for both product definition data and product operational data. Product definition data encompass the drawings and specifications of the hardware and software while product operations data address the maintenance and operational information. Taking each of the above questions in turn will allow us to map out our IP strategy.

The second myth regarding data rights: Most people interpret data rights as IP ownership. That is not correct. Data rights only apply to the last part of the definition provided by the *FAR*:

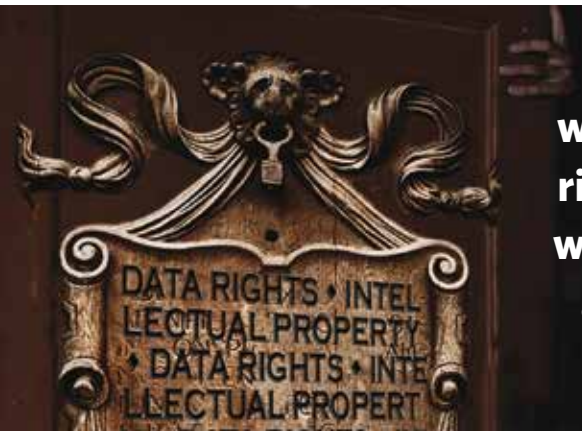
> "The respective rights of the government and the contractor regarding the use, disclosure or reproduction of the data … to be delivered."

You can't publish what you don't have. What you have may be misleading or incorrect. In other words, you may have the right to publish the information—but is it the right information? If you expect to manufacture the component but have only design data, you may not be able to do so.

That brings us to our third myth, which is that the requirements for data delivered must be addressed in contract terms. The government should not require data that are not necessary to meet its needs. In the Army Materiel Command's *Army Guide for the Preparation of a Program's Product Data Management Strategy* (DMS), we find:

> "By law, any enforceable right to see, access, or have a copy of data requires an OMB [Office of Management and Budget] approved DID [Data Item Description] or *FAR/DFARS [Defense Federal Acquisition Regulation Supplement]* Clause. … Therefore, DoD cannot assume it has any usable rights in data that is informally provided unless such rights are explicitly granted by the contractor and reviewed by legal counsel. All data access provisions must be reviewed by counsel and the data rights in accessed information must be addressed in the contract."

These takeaways are as important as the data the contractor shared with me informally—they don't give me the right to share the information with others (data rights). I only have the data rights if the contract explicatively grants that ownership. This can get program offices into some sticky situations, and has done so.



What if the previous program managers were focused on items other than IP and data rights? Is all lost, and are you therefore stuck with the contractor you have? No! Techniques are available to foster competition without possessing exclusive data rights.

What if the previous program managers were focused on items other than IP and data rights? Is all lost, and are you therefore stuck with the contractor you have? No! Techniques are available to foster competition without possessing exclusive data rights. Listed below are a few key strategies that can be applied to assist the program office with their competitions.

- Competitive Copying
- Form-Fit-Function
- Direct Licensing
- Leader-Follower
- Specific Acquisition
- Reverse Engineering

Competitive Techniques

In a 2010 Government Accountability Office report, the following reasons were provided for the program being stuck in a sole-source situation: "Most of the contracting and program officials at DoD that we spoke with pointed to the lack of access to technical data as one of the main barriers to competition. Some of the contracting officers described this condition as essentially being 'stuck' with a certain contractor. … Some contracting and program officials have inquired about the cost of obtaining the technical data, only to discover that the package is not for sale or that the purchase of it would be cost-prohibitive, especially the systems and equipment that

have been contracted out for decades." (GAO Report 10-833). This information could dishearten the government program manager. However, if you open the aperture, there are options for fostering competition without using data rights. The government program manager has many options to explore, some of them listed below. Examples of competitive techniques or common methods of obtaining competition are drawn from *The Government Contracts Reference Book—A Comprehensive Guide to the Language of Procurement* by R.C. Nash, et al.:

Competitive Copying

One of the most common methods of obtaining competition of relatively simple items is to solicit bids without furnishing technical data package. This strategy is very commonly used in the automotive industry. Go into any auto parts store and request a part for your car. It is a good bet that the manufacturer of the part did not have a data package from the original equipment manufacturer. Some manufacturer decided that it could produce at a lower cost a similar part that would fit and perform like the original part. The second manufacturer found what worked for the part and made improvements to produce the component at a lower cost, or with higher quality, or both.

Form-Fit-Function

Base the procurement of performance or functional specifications rather than provide detailed information to meet government requirements. Again, without proprietary information, I can specify the form, fit and function of a part or system and have that system built. To implement this strategy, the program office will need to supply the form, fit and function parameters. This is an exceptional strategy when the program has an Open Architecture strategy.

Direct Licensing

This is an agreement between the government and a development contractor that permits the government to select a second source after completion of development and requires the contractor to provide technical data and technical assistance to that contractor to make sure that the product is manufactured completely. In exchange, the development contractor is paid some combination of the costs incurred in transferring the technology and some sort of royalty.

This technique is applicable when the original manufacturer is updating its business strategy. It may see this business strategy as unprofitable or the state of the art as evolving, and therefore it is willing to extend the profitability of its IP longer by having another manufacturer bear the load while reaping royalties.

Leader Follower

This technique also establishes a direct relationship between the original developer of the item and competitors, but it does not call for a royalty payment. This operates as procurement techniques under which the sole-source producer furnishes manufacturing assistance and know-how to enable a follower company to become a source for the item.

The Navy's shipbuilding activities follow this strategy. There is limited competition for building ships. Therefore, the two shipbuilders share information so each shipyard can stay in business. The government benefits because there is competition, and the national shipbuilding assets continue. The companies benefit by staying in business.

Specific Acquisition

Another technique in establishing competition is to purchase the proprietary rights from the developer and then use the data as the basis for a competitive procurement. This is the mindset traditionally used by most program offices. They will buy the weapon-system IP and use it to have another manufacturer build the system at lower cost. While it sounds good, nowhere in the IP can we find the "secret sauce" that will allow duplication of the needed parts or programs.

For a specific acquisition, you must target specifically the areas you need to duplicate. Understand the targets early, and understand that you will need to have internal processes to ensure that the data are up to date. The remaining action is to determine at what price the contractor will sell the rights to its information. The difficulty arises in setting the price for those rights.

Reverse Engineering

A final method of obtaining competition without violating proprietary rights is for the government to "reverse engineer" the product and use the drawings created in a competitive environment. Reverse engineering can do two things. It can enable you to obtain additional competitors instead of being locked into one vendor. Also, through reverse engineering, the system or component can be improved over the original design.

Conclusion

Data rights and IP are complex subjects. This complexity is driven by three sources: the government, industry and the myths that surround them. The contractor looks at the subject through one lens. The government looks at the subject through a different lens, and the myths further exacerbate a complicated situation.

We have found that data rights and IP are not interchangeable. The mere possession of data rights doesn't mean you have information that would prove useful to create additional competition. Some other debunked mysteries include the question of whether I can make separate use of the data that I have. Legally, you can use the information only if the information is identified in the contract.

Even if we don't own the IP or the data rights, all is not lost. There are competitive techniques that a program office can explore to help foster competition and lower the costs of weapon systems acquisition.

The author can be contacted at **peter.czech@dau.mil**.